MALAYSIAN REPORTS

SOON HON SEN v. BONG KHIUK NYONG

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) and Ali F.J.) March 24, 1972]

[Kuching — Federal Court Civil Appeal No. 20 of 1971]

Land Law — Application to be registered as proprietor of land — Evidence required — Whether evidence in writing necessary — Sarawak Land Code (Cap. 81), s. 142.

Practice and Procedure — Appeal — New point of law raised.

The court of the 1st instance declared that the respondent was entitled to be registered as proprietor of a piece of land at Kuching under section 142 of the Sarawak Land Code. On appeal it was argued (1) that nothing short of a written agreement relating to the alleged sale transaction could provide a basis for an order under section 142 of the Sarawak Land Code; (2) that the English Statute of Frauds which requires contracts for sale of land to be in writing must apply to the case.

Held: (1) there is nothing in section 142 of the Sarawak Land Code to require a written agreement to be produced and the court, if satisfied with the proof of the transaction by legally admissible evidence, is entitled to make the order;

(2) the court could not consider the question of the Statute of Frauds as it was neither raised nor argued in the court below.

[**Editorial Note:** This case was referred to in *M.N. Guha Majunder* v. *R.E. Donough* [1974] 2 M.L.J. 114 where B.T.H. Lee said that the Federal Court necessarily implied that the Statute of Frauds 1677 is in force in Sarawak.]

Cases referred to:-

(1) *Clarke* v. *Callow* 46 L.J. Q.B. 53.

(2) *The Tasmania* [1890] A.C. 223.

(3) *Rengasamy Pillay* v. *Comptroller of Income Tax* [1970] 1 M.L.J. 233.

(4) *United Marketing Co.* v. *Kara* [1963] 1 W.L.R. 523.

FEDERAL COURT.

D. Tajem for the appellant.

S. F. Chong for the respondent.

Ali F.J.: This is an appeal from an order of the High Court at Kuching, Sarawak, whereby the respondent was declared entitled to be registered as proprietor of a piece of land held under Kuching Occupation Ticket No. 9313. The order was made following her application under section 142 of the Sarawak Land Code (Cap. 81), which provides as follows:

"Any person claiming to be rightfully entitled to any estate or interest in land by reason of the payment by him to the registered proprietor of the full amount agreed upon as purchase money and who has lost or inadvertently destroyed the instrument of transfer before registration thereof, or who has not obtained a registrable instrument of transfer executed by the registered proprietor and who, by reason of the continued absence of the registered proprietor from Sarawak without having appointed an attorney or because the whereabouts of the registered proprietor is unknown and it is not known whether he be alive or dead, is unable to obtain an instrument of transfer from the registered proprietor to replace the instrument that has been lost or destroyed or a registrable instrument of transfer, where one has not already been given, may apply to the High Court for an order declaring him to be entitled to the estate or interest claimed and to be registered as proprietor thereof and the court, upon production of such evidence as it considers necessary and upon proof to its satisfaction that all the purchase money has been duly paid, may make such order accordingly. Such order shall be liable to stamp duty as an instrument of transfer."

On the evidence at the hearing the learned judge, B. T. H. Lee J., found as proved that Chai Min Sam, the respondent's late husband, who died sometime in 1966 purchased the land in 1940 from the owner Madam Chong Ah Kuai (hereinafter referred to as (Madam Chong) for the agreed sum of $70 and that the amount has been fully paid up. The application by Originating Summons was originally intended to be heard *ex parte* as the respondent was unaware of the whereabouts of Madam Chong or was unaware whether she be alive or dead. The respondent was only aware that Madam Chong left Sarawak for China for medical treatment and has not been heard of since. There was a conflict of evidence on the question whether the transaction in 1940 between Chai Min Sam and Madam Chong was a sale or a loan transaction. The respondent's evidence was to the effect that since 1940 she and her late husband have been in occupation of the land and cultivating it as their own free from any interference. There was also produced a Deed of Transfer by which Madam Chong acquired ownership of the land from the previous proprietor and this undoubtedly had strengthened the respondent's claim that the transaction was a sale transaction. Quite apart from all these, there was also the affidavit of a witness who said that she lent the $70 to late Chai Min Sam and that she was present when the money was handed over to Madam Chong. The appellant's case rested mainly on his own evidence which was to the effect that he is the son of Madam Chong who had written two letters to say that the transaction was a loan. On the evidence, such as it was, it was open to the learned judge who heard the application to arrive at a finding, as he did in this case. It is not surprising for obvious reasons that the appellant had not challenged this finding.

The main theme of the appellant's argument in this appeal is that nothing short of a written agreement relating to the alleged sale transaction can provide a basis for an order under section 142 of the Sarawak Land Code (Cap. 81). We do not agree. There is nothing in the section to support that view. What seems clear to us is that the court, if satisfied with the proof of the transaction by legally admissible evidence, is entitled to make the order. The relevant words of the section are —

"upon production of such evidence as it considers necessary and upon proof to its satisfaction that all the purchase money has been duly paid, may make such order accordingly."

Among the various questions raised the appellant's counsel has submitted that the English Statute of Frauds which requires contracts for sale of land to be in writing must apply to this case. We find ourselves unable to consider this question. It was never raised or argued in the court below. Counsel for the respondent has rightly pointed out that in terms of O.19 r.15 of the Rules of the Supreme Court the Statute of Frauds has to be pleaded if it is to be relied upon as a defence. In *Clarke* v. *Callow*[1] Brett J.A. said, at page 54:

"But in the case of some particular defences where it is admitted, or cannot be denied, that a contract was entered into by the parties, the defendant may wish to evade his liability by setting up the Statute of Frauds, or by asserting that the engagement he made, the nature of which he perfectly understood when he made it, was illegal, and therefore not binding. In such a case the defendant must state specifically the statute on which he intends to rely. Order XIX, rule 23, is in my opinion, intended partly as an enunciation of the jealousy

with which the law regards that class of defences, and partly to assimilate the practice at law and in equity. If rule 23 is to be obeyed, if the defendant intends to insist on the defence that though he undoubtedly entered into a contract, yet as that contract was not in writing, he does not intend to observe it; then he must clearly state his intention, or if he means to deny the legality of a contract he has entered into, he must say so in plain terms."

In terms thus stated, we doubt if the defendant could even at the trial be allowed to rely on the Statute. The practice of not allowing a fresh point of law to be argued on appeal has been strictly observed in England as well as here. In the "*Tasmania*"[2] Lord Herschell explained the practice, at page 225, in these words:

"My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.

It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first; that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box."

In the more recent case of *Rengasamy Pillay* v. *Comptroller of Income Tax*[3] Lord Diplock said on page 234 to the same effect thus:

"As has been repeatedly stated it is not the practice of their Lordships, save in very exceptional cases, to allow a fresh point of law to be argued without the benefit of the judgments in the court below, even where all the facts which may be relevant to the new point are before their Lordships and beyond dispute. (See *United Marketing Co.* v. *Kara* ([1963] 1 W.L.R. 523))."

As regards other grounds of appeal, we do not consider them material or relevant to the issue in this appeal and will not, therefore, consider them.

Finally, we wish to observe that the status of the appellant in these proceedings is in some doubt. We can find no evidence to suggest that he has legal authority to represent Madam Chong. The respondent raised this point in the court below but the point was not considered. It seems strange that before the application came before the court, neither Madam Chong, nor her son nor her husband had shown any interest in the land. The respondent presumably must have been paying the quit rent or otherwise the land would have been auctioned by the State for non-payment of rent.

We have no doubt whatsoever that this appeal must fail.

Azmi L.P. and **Ismail Khan C.J.** concurred.

Appeal dismissed.

Solicitors: *Ibrahim & Co.; Chong Bros.*

ZAINAB BINTI OTHMAN v. SUPERINTENDENT OF PRISONS, PULAU JEREJAK, PENANG

[O.C.J. (Chang Min Tat J.) August 14, 1973]
[Penang — Originating Motion No. 10 of 1973]

Habeas Corpus — Detention — Orders of Minister — Dates of two orders — Doubts not resolved — Emergency (Public Order and Prevention of Crime) Ordinance 5 of 1969, s. 4(1).

The question in this application for *habeas corpus* was whether the detainee was detained under a valid and effective order of the Minister. Counsel for the applicant alleged that there were two orders made by the Minister in exercise of his powers under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, one dated 8 August 1973 and the other 6 August 1973. The order dated 8 August 1973 was never served on the detainee, and the respondent conceded that it was inoperative, but contended that the detainee was validly detained under the order dated 6 August 1973.

Held: *ex facie* there was some doubt whether the order of detention as served was the one actually intended to be made by the Minister and therefore an order would be made for a writ of *habeas corpus* to issue.

[**Editorial Note:** As to the question of costs herein see *Osman bin Mat Isa & Ors.* v. *Superintendent of Prisons, Alor Star & Anor.* [1974] 1 M.L.J. 189.]

ORIGINATING MOTION.

Karpal Singh for the applicant.

Abu Talib bin Othman (Legal Adviser, Penang) for the respondent.

Chang Min Tat J.: The question before me in this application by Motion for a Writ of *Habeas Corpus* to issue is, as contended by the learned Legal Adviser Penang, whether the detainee was presently detained under a valid and effective order of the Minister for Home Affairs.

It was alleged by Mr. Karpal Singh for the detainee, that there were two orders made by the Minister in exercise of his powers under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 5 of 1969, one dated 8 August and the other 6 August 1973. It would perhaps be more correct to say "bearing the date" and not "dated," as it would appear that the Minister signed the orders a fortnight or so earlier. The date expressed was factually the date of the commencement of the detention, but for convenience I shall continue to use the word, "dated".

The order dated 8 August was never served on the detainee and whatever its validity, the Legal Adviser conceded that it was inoperative. He however contended that the detainee was validly detained under the order dated 6 August which was served on him on the same day.

Inspection of the orders was offered to me and I was strongly urged to have a look at them. Only the order of 6 August was produced. It was impressed on me by Mr. Karpal Singh that the figure "6" was a superimposition over the figure "8" which had been erased. Having inspected the order, I am unable to say that Mr. Karpal Singh's contention is without foundation.